Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 03517/2008

In the matter of an application to appoint a liquidator to wind up the affairs of Dyoll Group Limited and in the matter of resolutions passed at an Extraordinary General Meeting of Dyoll Group Limited on May 2, 2008

And

In the matter of the Companies Act

K. Gordon instructed by Samuda & Johnson for Co-liquidator P. Cole

J. Graham and I. McDonald instructed by Debbie Ann Gordon & Company for J. Lee Liquidator of Dyoll Insurance

C. George and N. Walker instructed by Hart Muirhead Fatta for Co-liquidator K. Tomlinson

J. Lee, P. Cole and K. Tomlinson present

Heard: April 8 and 12, 2010

Winding-up in progress-type of winding-up

Lawrence-Beswick J

1. Dyoll Group Limited is being wound up. There is no dispute about that.

Co-liquidators have been appointed. This is an application by one of the two co-liquidators of Dyoll Group Limited for a declaration by the Court as to the type of winding-up under which Dyoll Group Limited is being wound up.

2. The duties of the liquidator towards any assets recovered and any liabilities to be discharged depend on the type of winding-up in progress.

3. On May 19, 2009, an Order was made by the Court *inter alia* that Dyoll Group Limited be wound up under the supervision of the Court and that when appropriate the winding-up petition be filed by the liquidator. There is no mention as to whether this was consequent upon a members' or creditors' winding-up.

4. It is undisputed that a resolution was passed at an Extraordinary General Meeting of Dyoll Group Limited on May 2, 2008 and that it formed part of the submissions to the Court when the Order of May 19, 2009 was being considered.

5. That resolution stated:

> "That approval to make the proper application which may be necessary or required to carry into effect the resolution to wind up the company under the supervision of the Supreme Court of Judicature of Jamaica in accordance with the provisions of the Companies Act and that the Court be requested to appoint a liquidator as it sees fit was authorized by the shareholders."

In my view this resolution appears to refer to a previous resolution.

6. However, there is no evidence of any other resolution concerning winding-up and a winding-up under the supervision of the Court must be preceded by a voluntary winding-up. It is evident that prior to this application no parties were concerned about the precise type of winding-up to which Dyoll Group would be subject.

7. I am fortified in that view by the fact that still later in January 2010, Dyoll Group Limited and Dyoll Insurance entered into a Consent Order in which a co-liquidator was appointed to join the original liquidator who had been appointed by the May 19, 2009 Order. Again, there was no mention of the type of winding-up.

8. The application which culminated in the Consent Order had included the request for a determination as to whether Dyoll Group had been wound up in accordance with the law, but the Consent Order did not address that particular issue.

9. However, now that the liquidators appear to be working on the winding-up process, one of the co-liquidators wishes the declaration now being sought from the Court.

10. Section 214 of the Companies Act, 2004 states:

> "(1) The winding-up of a company may be either –
>
> (a) by the Court; or
>
> (b) voluntary; or
>
> (b) subject to the supervision of the Court."

11. The Act expands on each type of winding-up and at Section 220 states:

> "A company may be wound up by the Court if –
>
> (a) The company has by special resolution resolved that the company be wound up by the Court.
>
> (b) Default is made in delivering the statutory report …
>
> (c) The company does not commence its business within a year from its incorporation …
>
> (d) The company is unable to pay its debts;
>
> (e) The Court is of opining that it is just and equitable that the company should be wound up."

Nothing in this section applies to the instant circumstances.

12. Voluntary winding-up is governed by Section 272 (1) of the Companies Act 2004 which states:

> "(1) A company may be wound up voluntarily-

(a) when the period … fixed for the duration of the company by the articles expires ….

(b) if the company resolves by special resolution that the company be wound up voluntarily;

(c) if the company resolves by extraordinary resolution … that it is advisable to wind-up.

Here again, the section does not touch precisely on the circumstances of the instant case.

13. Further, Section 277 of the Companies Act provides that:

> "(1) Where it is proposed to wind-up a company voluntarily, the directors of the company … may, at a meeting of the directors make a statutory declaration to the effect that … they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding twelve months …."

There is no evidence of such a declaration.

14. Section 277 of the Companies Act provides:

> "(4) A winding-up in the case of which a declaration has been made and delivered … is … referred to as "a members' voluntary winding-up," and a winding-up in the case of which a declaration has not been made and delivered … is … referred to as "a creditors' voluntary winding-up"."

15. The Companies Act details further requirements for a creditor's voluntary winding-up. At Section 287 it provides:

> "(1) The company shall cause a meeting of the creditors … to be summoned for the day, or … following …day, on which there is …the meeting at which the resolution for voluntary winding-up is to be proposed …

> (2) The company shall cause notice of the meeting of the creditors to be advertised … in the Gazette … and in the daily newspaper…."

There is no evidence of this having occurred.

16. Winding-up subject to supervision of the Court is governed by Section 304 of the Companies Act which provides:

> "When a company has passed a resolution for voluntary winding-up, the Court may make an order that the voluntary winding-up shall continue but subject to such supervision of the Court … as the Court thinks just."

17. Although all parties agree that a winding-up is in progress and that liquidators have been appointed, it is clear that none of the requirements for any one particular type of winding-up have been entirely fulfilled.

18. The Judge who made the Order of May 19, 2009 is not available to further interpret it. That Order was made exparte and Counsel who argued for it to be granted are also not available. The Consent Order of 2010 was based on the presumption of the accuracy of the May 2009 Order, without a detailed analysis of it.

19. There has been no appeal of any Order, nor any request for any Order to be set aside. Indeed in addition to the two liquidators having been appointed, so too has a Committee of Inspection been chosen. The liquidators were required by the Consent Order to convene a meeting of the creditors of Dyoll Group.

20. My task is unenviable but I seek now to try to assist the liquidators who must be made aware of the type of winding-up in progress in order to discharge their functions lawfully. Anything short of that may leave them personally liable for actions they take based on their own understanding of the type of winding-up which is in progress. I agree

with the submission that there has been no clear statement as to the type of winding-up in progress.

21. It appears to me that by the process of elimination, this winding-up comes most closely under a voluntary winding-up. Would it be a members' winding-up or that of the creditors?

22. A member's voluntary winding-up can only occur where the company is solvent.

There is uncontradicted affidavit evidence in July 2008 of a Director of Dyoll Group Limited that if the claim by Dyoll Insurance for a summary judgment against Dyoll Group were successful, Dyoll Group could not be said to be solvent.

23. The claim was successful and on February 13, 2009, summary judgment was entered against Dyoll Group Limited in favour of Dyoll Insurance.

24. It follows that when the Order was made in May 2009 and continuing until now, Dyoll Group was insolvent. In the difficult circumstances of this case where so much has been left unsaid, I determine that because of its insolvency, the winding up concerns a creditors' voluntary winding-up which commenced when the Court, on May 19, 2009 ordered as it did. I have determined that date as being appropriate in the absence of evidence of a date when a clear, unequivocal resolution to wind-up was passed by Dyoll Group.

25. However, I am well aware that a further complication exists. An application for this summary judgment to be set aside is scheduled to be heard in approximately six weeks time on May 31, 2010. If that judgment is set aside, then a consequence would be that Dyoll Group would then be solvent.

26. One may have thought in these circumstances, the more prudent course may have been to await the determination of the status of that summary judgment, before seeking a declaration as to the type of winding-up.

27. Indeed, the liquidators obviously differ in their views as to the urgency for this declaration at this time. However, assets of Dyoll Group Limited are being identified. In my view, the liquidators would be well advised to delay any disbursements, if possible, until the final determination of the application to set aside the summary judgment. When that determination is made, that Court may well have to direct its mind as to whether or not there can or should be any variation in the type of winding-up which is progressing.

28. However, at this time, the Dyoll Group Limited is insolvent because of the summary judgment and the Order of May 19, 2009 states that a named liquidator is "appointed … for the purpose … of … winding-up … the company under the supervision of the Supreme Court." Therefore the Declaration I make now is that the winding-up is subject to the supervision of the Court consequent upon a creditors' voluntary winding-up.

29. Costs to Messrs P. Cole, J. Lee and K. Tomlinson to be agreed by the Committee of Inspection or to be taxed.